IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945.

No.

HUGH GREER CARRUTHERS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Grounds of Jurisdiction.

The order of the Circuit Court of Appeals was entered December 27, 1945. Jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. 347 (a). Stay of mandate pending this petition was entered January 2, 1946.

Concise Statement of the Case.

We respectfully refer the Court to pp. 6-9, *supra,* for a concise statement of the facts.

Specification of Errors to be Urged.

The Circuit Court of Appeals erred:

(a) In holding that the charge to the jury set forth, *supra,* at page 2 did not violate the rights of petitioner under the First Amendment to the Constitution providing

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

(b) In holding that under the circumstances of this case, there was no abuse of discretion on the part of the trial judge in denying petitioner's motion to withdraw a juror and continue the case, on the ground that petitioner failed to show prejudice resulting to him from the publication of the admittedly inflammatory and prejudicial newspaper article, quoted at page 3, *supra,* and by the reading thereof by one of the jurors prior to verdict.

(c) In holding that the charge to the jury as to the presumption of innocence, quoted at page 4, *supra,* did not warrant a reversal of the conviction.

ARGUMENT.

I.

The Court committed reversible error in its charge to the jury in violating the right of petitioner to the free exercise of religion which was guaranteed to petitioner by the First Amendment to the Constitution.

Recognizing that the activities of petitioner charged in the indictment and pictured in the evidence concerned matters relating to his religious beliefs and involved the free exercise of his religion which had been guaranteed by the Constitution, the Court instructed the jury in the manner quoted at page 2, *supra.*

Before the jury were instructed and at the conclusion of all the evidence, petitioner had made a motion for a directed verdict of not guilty, based upon the ground that the indictment itself violated the petitioner's right to the free exercise of his religion guaranteed by the Constitution. (Rec. 480-481) Such motion was denied. (Rec. 482)

Immediately after the conclusion of the giving of the charge and in the presence of the jury, the following colloquy occurred between the court and petitioner's counsel: (Rec. 465-466)

> "Mr. Bachrach: 'My first request is that you give in substance the following: That the representations of the defendants or any of them concerning or relating to the subjects of breathing, silence and positions of persons during sleep are all matters within the field of religion as taught by the defendant Carruthers, and the truth or falsity of such representations, if any, may not be questioned in any way by the jury in arriving at its verdict in this case.'

> The Court: 'I will pass on that right now. I gave that with this modification. Where you say it is your suggestion that breathing, silence and position of persons during sleep are all matters within the field of religion, I have added—"if you believe that they are" —instead of the Court passing upon that question it is up to the jury.'
>
> Mr. Bachrach: 'To which I except'."

The religious nature of the Neological Foundation and that the activities of petitioner in directing it involved the teaching of religion were facts recognized throughout the proceedings. Thus paragraph 6 of count 1 of the indictment (which was incorporated in all succeeding counts) alleged the delivery by petitioner of radio programs and the sending by petitioner to members and prospective members of the Neological Foundation of literature relating to the purposes, activities and functions of the Foundation, giving

> "instruction in such subjects as Personal Development, The Omnipresent Universal Mind, Imagination, Will Power, * * * Creative Thinking, the Thibetan Science of Correct Breathing, the Occult Sciences, Telepathy, Clairvoyance, Hypnosis, Metempsychosis, Auto-suggestion, the Oriental Culture of the Thibetan, Himalayan, Chinese and Egyptian Secret Orders of the Great Lodge of Mystics. * * *" (Rec. 5)

Seventeen Government witnesses and forty-nine defense witnesses, totalling sixty-six altogether, testified that the Neological Foundation and the teachings of petitioner were of a religious character. (Rec. 190, 194, 196, 201, 213, 216, 218, 224, 227, 229, 231, 235, 238, 251, 266, 273, 281, 291, 294, 298, 303, 304, 308, 311, 313, 316, 318, 319, 320, 323, 325, 329, 330, 331, 336, 338, 341, 343, 346, 350, 354, 357, 360, 362, 363, 367, 368, 371, 372, 374, 376, 377, 378, 380, 384, 387, 388, 389, 391, 393, 410, 411, 412, 414, 419, 422.) No witness testified to the contrary.

The issue between the petitioner and the courts below is narrow. It involves the propriety of the action of the trial judge in leaving to the jury as an issue for its determination whether petitioner's representations relating to breathing, silence and position of persons during sleep were believed by the jurors to be matters within the field of religion as taught by petitioner.

The Court of Appeals finds the activities of petitioner to have been "so broad and so diversified at times as to reasonably raise the question whether his activities were in fact of a religious nature." (Rec. 511) Its opinion contains fragmentary quotations from petitioner's letters for the purpose of showing that petitioner's appeal was not religious and concludes that a real issue of fact existed as to whether petitioner was "claiming to advance a religious doctrine." (Rec. 511, 512)

The dictates of brevity herein confine us to a single illustration to demonstrate the error into which the Court of Appeals fell in basing its conclusion on this vital matter on fragmentary excerpts from petitioner's communications contained in the Government's brief. Thus the Court of Appeals quotes from petitioner's letter of May 28, 1942 (Gov. Ex. 30; Rec. 126-472) a portion of a sentence, the quoted portion reading: "* * * it is necessary to function as a Fraternity as well as an educational activity * * *." (Rec. 512) In the context of the balance of the letter the wholly immaterial nature of this portion of a sentence contained therein becomes manifest. We quote: (Rec. 128-129)

> "I have learned, during recent conversations, that some of our members, trying to explain Neology to others, fall short of the actual truth regarding this powerful philosophy. To say that it is the philosophy of Jesus Christ is not the whole truth. That Neology includes the interpretation of the Gospel taught by the Master is a sensible statement, but Neology also includes the modern interpretation of the Ancient Mys-

teries, or Wisdom of the Ages, outlined by the Master Thinkers, Scholars and Philosophers known to have possessed this great Truth in all ages.

The simple basic principle underlying Neology lies in man's ability to safely declare his At-one-ment with The Creative Principle, or God, or Jehovah, or The Almighty, or Allah, or The Universal Law of Cause and Effect, spiritually, because of the spiritual omnipresence of Omnipotence. The individual will designate his Deity according to his own interpretation of the Supreme Principle, but by whatever name, The Creator remains and continues unchanged, simply because He, or It, is The Unchangeable.

I am sure that many of our Fellows have very little understanding of the tremendous value they are securing in the Second Series. I know of no other teaching that has ever given the fundamentals underlying actual Lodge work, or the basic principles upon which every religion has been developed. It is absolutely necessary to have an understanding of the developments and teachings of the ancient Mysteries and Lodges before one can formulate a hypothesis for Personal Development for Self Mastery. How can one declare, " 'I' and The Father (Omnipotence) are One (because) 'I' am in Him, or It, and (for that very reason) He, or It, is In me" (because of the universal omnipresence of The Creator in spiritual form, or essence), until one understands the actual reason, or basis, for his conclusion and statement? But the fact that through understanding one can safely realize that a definite part of the universal spiritual omnipresence of Omnipotence Is, inherently and innately within him, makes that one reasonably certain that The Part within Must be the same in kind and quality as The Whole. * * *

Formulate the idea that 'I' Am . . . that 'I' Am I; that that 'I' is my inner Person, or Soul, or Spirit, . . . and a definite part of the omnipresent spirituality of Omnipotence omnipresent, and You have definitely identified Your True Self. You are the temple of God! Not because I have said so, but because you can prove that truth within yourself and your every day life and

affairs. The fact that you are consciously aware of an inner prompting (never from without—always within) to avoid wrong, or evil, or error, whenever you are about to act wrong . . . and always just before the act, would indicate that there is within you a Power and Intelligence that Knows, Sees and Understands all that is to be known, seen or understood,—and certainly more than you can consciously know. Call that Inner Intelligence by the name 'Spirit,' or 'I,' or 'God,' or 'Omnipotence,' or conscience, or Still Small Voice, and you cannot change It one iota; the fact remains that It is within.

Or see, Luke 17:20: for the admonition by Jesus, The Christ, or read the declaration by Paul, in 1st Corinthians, 6:19, and you have proof that Jesus, and Paul, as well as many others, knew, understood, lived and thought the Law of Cause and Effect."

See also letter of December 1st, 1942, Government's Exhibit 19 (R. 86-93), from which the Circuit Court of Appeals quotes in its opinion (Rec. 511).

Even if there were a real issue whether *all* of petitioner's activities in directing the affairs of the Neological Foundation were in fact of a religious nature, as the Circuit Court of Appeals finds, it does not follow that the representations as to breathing, silence and position of persons during sleep were not matters within the field of religion as taught by petitioner. In *United States* v. *Ballard*, 322 U.S. 78 at 83-84, this Court recognized that some representations could involve the free exercise of the defendant's religion even though others did not. The Court of Appeals herein itself recognized that "the subjects of 'breathing' and 'silence' find expression as religious practices in the ancient Yoga Creed," citing 29 Ency. Am. 638. (Rec. 511) The record is barren of any evidence showing that they were not also matters of religion, as taught by petitioner.

Even if a real issue existed as to the religious characte of representations on the specific subjects set forth in th instruction in question, we submit that it was the duty o the Court itself to determine that issue and to instruct th jury as to its determination as a matter of law. Only i that way could the guarantee of free exercise of his religio by petitioner set forth in the Constitution be performed b the Government and petitioner's reliance upon such guarantee not prove retroactively to have been a snare and a delusion, reliance by him upon which cost him his personal liberty.

This Court recognized in *United States* v. *Ballard*, 322 U. S. 78, the utter futility of expecting the ordinary juror to be able to pass with objectivity upon beliefs and other faiths which to him appear to constitute rank heresy. In fact, the history of religious persecution throughout recorded time explains the surrounding of the free exercise of religion by the protection of a Constitutional guarantee. The decision of this Court in *United States* v. *Ballard*, 322 U. S. 78, was based upon considerations of this character. In that case this Court said: (pp. 86-87)

> "The Fathers of the Constitution were not unaware of the varied and extreme views of religious sects, of the violence of disagreement among them, and of the lack of any one religious creed on which all men would agree. They fashioned a charter of government which envisaged the widest possible toleration of conflicting views. Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views. The religious views espoused by respondents might seem incredible, if not preposterous, to most people. *But if those doctrines are subject to trial before a jury charged with finding their truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain.* The First Amendment does not select any one

> group or any one type of religion for preferred treatment. It puts them all in that position. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 87 L. Ed. 1292, 63 S. Ct. 870, 891, 146 A. L. R. 81. As stated in *Davis* v. *Beason,* 133 U. S. 333, 342, 33 L. Ed. 637, 639, 10 S. Ct. 299, 'With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with.' " (Emphasis supplied.)

The mere fact that one preaching a religion engages in commercial activities to obtain money to finance his organization does not destroy or lessen his Constitutional protection. In *Murdock* v. *Pennsylvania,* 319 U. S. 105, this Court said: (p. 111)

> "* * * But the mere fact that the religious literature is 'sold' by itinerant preachers rather than 'donated' does not transform evangelism into a commercial enterprise. If it did, then the passing of the collection plate in church would make the church service a commercial project. *The Constitutional rights of those spreading their religious beliefs through the spoken and printed words are not to be gauged by standards governing retailers or wholesalers of books.* The right to use the press for expressing one's views is not to be measured by the protection afforded commercial handbills. It should be remembered that the pamphlets of Thomas Paine were not distributed free of charge. *It is plain that a religious organization needs to remain a going concern. But an itinerant evangelist however misguided or intolerant he may be, does not become a mere book agent by selling the Bible or religious tracts to help defray or to sustain him.* Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." (Emphasis ours)

In conditioning the duty of the jury to accept as true petitioner's representations concerning the subjects of breath-

ing, silence and position of persons during sleep upon their preliminary finding that such representations involved matters within the field of religion as taught by petitioner the Court exposed petitioner to all the dangers against which the Constitutional guarantee and the decision in *United States* v. *Ballard,* 322 U. S. 78, were obviously intended to protect him.

The Prosecutor quickly discerned the opportunity presented to convert the proceedings into a heresy trial. Knowing that the Court was leaving to the jury as an issue of fact the determination of whether these representations constituted matters of religion, he deliberately referred to the "Neological nonsense that was spawned in the last few years." Objection to this argument was overruled by the Court who stated that the point was "saved." (Rec. 443) Such argument fitted perfectly into the examination by the Prosecutor of a Government witness (Rec. 251) and his cross examination of petitioner's witnesses who testified to the giving of instruction by petitioner upon the subjects of breathing, silence and position of persons during sleep. Therein the Prosecutor did his best to ridicule the teachings, the teacher, the witnesses and all other members of the Neological Foundation who believed in them and testified to the benefits which in their opinions were derived by them from such instruction. (Rec. 291, 292, 298, 300, 303, 309, 312, 314, 320, 329, 330, 333, 337, 344, 346, 356, 364, 366, 369, 379, 381, 383, 385, 391, 413, 416, 420.)

No judicial innovation is required to protect the Constitutional guarantee by requiring issues of this kind to be decided by the Court and by requiring the jury to be instructed upon the basis of the Court's decision. It is a matter of Hornbook law that the construction of written instruments, such as statutes, ordinances, constitutional provisions, private contracts and wills, present questions for determination by the Court as distinguished from the jury and that it is the duty of the Court to tell the jury

the status of such matters as a part of its charge. The enforcement of this principle of general application becomes vitally important when it is necessary to enable the Government realistically to perform the guarantee of the free exercise of religion found in the Constitution. The greater the pressure in the light of other facts and circumstances to depart from the protection which the Constitution accords to the religious beliefs of all persons and to their free exercise thereof, the more vital becomes the duty of the judge to give practical sanction to the Constitutional mandate.

Supervision by this Court of the administration of criminal justice in the Federal courts for the purpose of establishing and maintaining civilized standards of procedure and evidence is a function which it has recognized and exercised from the very beginning of its history. The principles laid down by it have not been restricted to those derived solely from the Constitution. Nevertheless, converting the dictates of the Constitution into realistic safeguards represents the exercise of this duty upon the highest plane. In *McNabb* v. *United States,* 318 U. S. 332 this Court expressed its views on this subject as follows: (pp. 340-341)

> "* * * the scope of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of Constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so

basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our Federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the Federal criminal law in the Federal courts.

"The principles governing the admissibility of evidence in Federal criminal trials have not been restricted, therefore, to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts, see *Nardone* v. *United States*, 308 U. S. 338, 341, 342, 84 L. ed. 307, 311, 312, 60 S. Ct. 266, this Court has, from the very beginning of its history, formulated rules of evidence to be applied in Federal criminal prosecutions."

In a footnote at this point it adds: (p. 341, f.n. 6)

"The function of formulating rules of evidence in areas not governed by statute has always been one of the chief concerns of courts: 'The rules of evidence on which we practice today have mostly grown up at the hands of the judges; and, except as they may be really something more than rules of evidence, they may, in the main, properly enough be left to them to be modified and reshaped.' J. B. Thayer, A Preliminary Treatise on Evidence at the Common Law (1898) pp. 530, 531."

This Court exercised this essential function in *U. S.* v. *Ballard*, 322 U. S. 78, in order to carry out the guaranty of the free exercise of religion set forth in the Constitution. The decision under review, viewed realistically, results in the substantial destruction of this safeguard by restoring to the jury, under the influence of argument by Government counsel, the opportunity to indulge religious intolerance and prejudice at the expense of persons accused of serious violations of the criminal law. We are confident that this Court will "hold the line."

In the Court of Appeals the Government argued that the giving of this instruction was harmless error because

of the "overwhelming evidence" of petitioner's guilt. No effort was made to demonstrate the truth of this *ipse dixit*. We deny it. This Court very recently, in *Weiler* v. *U. S.*, 323 U. S. 606, 89 L. Ed. 443, in reversing a conviction for perjury because of the refusal to give a proper instruction tendered by the defendant, answered such a contention as follows: (p. 611)

> "It is argued that this error did not prejudice the defendant. We cannot say that it did not. The jury convicted without being instructed that more than the testimony of a single witness was required to justify their verdict. This was no mere 'technical' error relating to the 'formalities and minutiae' of the trial. *Bruno* v. *United States, supra* (308 U. S. 293, 294, 84 L. Ed. 260, 261, 60 S. Ct. 198). We are not authorized to look at the printed record, resolve conflicting evidence, and reach the conclusion that the error was harmless because we think the defendant was guilty. That would be to substitute our judgment for that of the jury and, under our system of justice, juries alone have been entrusted with that responsibility."

We respectfully submit that the giving of the instruction complained of deprived petitioner of the freedom of religion guaranteed to him by the Constitution.

II.

The Court committed reversible error in denying the motion made by petitioner to withdraw a juror and continue the case.

The taking of evidence at the trial ended at 2:30 P. M. Friday, February 16, 1945. (Rec. 437) The jury were then permitted to separate and go to their respective homes. (Rec. 439) On that evening there appeared in the Chicago Daily News the article entitled, "**Lama Dodges Questioning On Robbery**" set forth at p. 3, *supra*. When Court reconvened the following Monday morning petitioner's

counsel presented said motion to withdraw a juror and continue the case supported by affidavit of his counsel. The affidavit in part set forth the fact that the Chicago Daily News had a circulation in Chicago and its environs of upwards of 400,000 and was circulated for sale to the public in all of the communities in which the jurors lived and had probably been read by some or all of the jurors. (Rec. 437-439)

At the request of petitioner's counsel the Court thereupon asked the jurors collectively whether any of them had read an article concerning the case which appeared in the Chicago Daily News on Friday afternoon. (Rec. 439-444) Juror Vincent stated that he "might have" read it. (Rec. 440) The Court then stated to the jurors collectively:

> "If you have, I told you when you were being selected that the only evidence that you would consider would take place in this court room and which was admissible and was ruled on by the Court. If any of you have read anything, or of any of the defendants, that you did not hear in the court room by sworn testimony or documents you are to entirely disregard it, or anything that might have appeared before you get this case for your deliberation. Now I take it that you all understand it?" (Rec. 440)

Thereupon, at the request of petitioner's counsel each juror was polled separately. (Rec. 441-442) Juror Vincent, upon being polled, stated, "I remember it. I would like to see it again to be sure. I read the News. I probably read it." (Rec. 441) The following colloquy thereupon occurred between the Court and Juror Vincent:

> "The Court: Do you recall now if there was anything in the article, if you did read it, that was not in evidence in this case, in this courtroom?
>
> Juror Vincent: I read in the paper something. The rest I didn't hear. It was discussed after the case was dismissed Friday afternoon.

The Court: It was discussed by whom?

Juror Vincent: A motion was made by the defendants.

The Court: Yes.

Juror Vincent: That is what I read.

The Court: That is purely a legal question.

Juror Vincent: That is what I figured.

The Court: Anything else except the denial of that motion.

Juror Vincent: That is what I recall.

The Court: For your information, that is done in every case.

Juror Vincent: That is all I recall of the article.

The Court: That means whether it is a question of law for the Court or jury to pass upon. That is what you have reference to?

Juror Vincent: That is my understanding." (Rec. 441)

The Court thereupon denied the motion. (Rec. 442)

Juror Vincent, who acknowledged reading the Daily News article, was a member of the regular panel. In denying the motion the Court took under consideration substituting an alternate juror for him, but did not do so. (Rec. 453)

The Judge, the prosecutor, Mr. McGreal, and petitioner's counsel, Mr. Bachrach, all recognized that Juror Vincent had read the article. This clearly appears from the following colloquy:

"Mr. Bachrach: I would like to have the record show if your Honor please, in your polling of the jury, the juror who answered that he had read the Daily News item on Friday afternoon was a man of the regular panel and was not an alternate. May the record so show?

The Court: Yes.

Mr. McGreal: He stated his name.

Mr. Bachrach: I just wanted to make it clear.

* * *

The Court: Well, I take it from the fourteen I examined, *only one read an article* in the Daily News.

Mr. Bachrach: Yes.

The Court: *One juror did read it,* he said it was what took place after the closing of the case on Friday, and that is why I denied the motion. (Emphasis ours) (Rec. 453)

The Court of Appeals recognized the "inflammatory and prejudicial" character of the article and that its publication prior to verdict was both "improper and unethical." Nevertheless, it held that the denial of the motion was not an abuse of discretion, since in its opinion petitioner "failed to show prejudice resulting to him from the publication of the article," because the only juror who acknowledged reading the article stated that all he recalled of its contents was the reference to "the denial of a motion." (Rec. 514) According to the Court of Appeals, it could "only assume that the jury answered the trial court's inquiries truthfully" and upon that assumption it appeared that "Vincent's mind was in no way affected by what he had seen or read." (Rec. 515)

Examination of the article (p. 2, *supra*) discloses that its prejudicial character lies both in its reference to the fact that petitioner had served a prison term in New York State for highway robbery, which fact was not in evidence and reached the jury only through this article, and in its reference to the failure of petitioner to testify as a witness in his defense. Both the nature of the article and its timing were such as to insure petitioner's conviction by the jury.

Petitioner was not a witness at the trial and under 28 U. S. C., Sec. 632, he was not required to testify in his own

behalf and his failure to do so could not furnish the basis of any presumption against him.

The title of the article and paragraphs 1 and 3 contained the highly inflammatory and prejudicial matter rendering its publication and reading by Juror Vincent destructive of petitioner's right to a fair trial. Only paragraphs 2 and 4, which were inserted among these viciously improper matters, related to the motion for a directed verdict and its denial, which Juror Vincent acknowledged recalling from his reading of the article. That Juror Vincent could have read only the second and fourth paragraphs of the article and failed to read the heading and first and third paragraphs is so unlikely and improbable as to be disregarded. The set-up of the article confirms the recognized fact that he read it all.

Courts charged with the duty of seeing that persons accused of crime are given the fair trial to which they are entitled by law may not be so naïve as to accept as final and uncontrovertible the statements of a juror under the circumstances confronting Juror Vincent. He obviously knew that the reading of the article at all was improper and in violation of the admonishment of the Court with respect to his duties as a juror. (Rec. 170) He had every interest in answering the Court's questions in a manner to save face for himself. The very genuine concern of the trial judge over the effect of the incident upon the jury appears from his consideration of replacing Juror Vincent with an alternate juror. His failure to do so was due only to the fact that his power under the statutory provision providing for alternate jurors did not extend to substitution upon any such ground.

If the prosecutor had argued to the jury the prejudicial and inflammatory matters appearing in the newspaper article, a mistrial would have resulted. *Wilson* v. *U. S.*, 149 U. S. 60. If prior to deliberation upon their verdict one

of the jurors had been approached by a third person and been told the matters contained in said newspaper article, a mistrial would also have resulted.

Actually, one of the jurors had been informed through this newspaper article of these admittedly prejudicial matters and at the same time petitioner's counsel had no opportunity to deal specifically with the contents of the article before the jury. Obviously he would not request an instruction that the jury should not consider the newspaper statement that petitioner had been convicted of highway robbery. Telling the jury, as the Judge did, that they should consider only evidence introduced in the courtroom by way of testimony and exhibits was not by any means equivalent to a specific direction to disregard the highly prejudicial and inflammable matters contained in said article.

Moreover, no instruction could have wiped from the mind of Juror Vincent the contamination produced by reading such article. Once inoculated with the germ of prejudice it was impossible to render the virus innocuous.

The article was of such character as to arouse prejudice in anyone reading it. That its contents and the prejudice resulting from it were not communicated by Juror Vincent to the other jurors is at best a remote possibility. He was not asked whether he had communicated this "contraband" information to any of his fellow jurors between reading it on Friday afternoon and the polling of the jury the following Monday morning.

The case had been on trial for over three weeks. Petitioner had not taken the stand to testify in his own behalf although his two co-defendants had. (Rec. 394, 422) The jurors would naturally be curious why he did not testify. The newspaper article in question supplied the answer, namely, he did not testify because he did not want

to be cross-examined regarding a conviction of highway robbery. Supplying this information to the jury in this fashion was even more harmful than if the prosecutor had stated to the jury in his argument that the petitioner had been convicted of highway robbery, since under those circumstances the Court would have been able to admonish the jury specifically to disregard the statement and an opportunity would have been available to petitioner's counsel to suggest methods of overcoming the obvious prejudice resulting from such argument.

In no case which we have seen in which the Court has failed to declare a mistrial due to the prejudice resulting to the defendant in a serious criminal case from the publication during the trial of newspaper articles were the facts even remotely similar to those in the case at bar. All such cases are distinguishable because in them either (1) no juror had read the article complained of; or (2) the defendant himself had previously testified to the harmful matter appearing in the article; or (3) the material appearing in the article was not of the order of prejudice characterizing the newspaper article herein, which referred both to the failure of petitioner to testify in his own behalf and drew viciously prejudicial inferences therefrom and also made the statement that petitioner had served a penitentiary sentence for highway robbery, of which there was no evidence whatever before the jury.

On the other hand, several cases support petitioner's contention that the circumstances presented by this incident entitle him to a new trial.

In *United States* v. *Ogden*, 105 Fed. 371 (D. C., E. D. Pa.) a newspaper article containing many prejudicial statements, was published in a newspaper before the case was submitted to the jury, commenting upon the failure of the defendant to testify in his own behalf. In its opinion the court stated that the publishing of such comments not

only was a flagrant impropriety, but if those words had been communicated to the juror or had been contained in a letter addressed to him, there would have been declared an immediate mistrial.

Commenting on the article referring to the failure of the defendant to testify the court made these pertinent remarks (p. 374):

> " • • • in defiance of the constitutional provision that no man shall be obliged to testify against himself, attention was called to that fact, and it was asserted that the defendant did not venture to testify in his own behalf,—an assertion which neither judge nor counsel would have been permitted to make during the course of the trial. It is unnecessary to say that such comments upon a pending case violate the elementary rules that demand justice and fair play to a man accused of crime. Under our system of jurisprudence, at least, cases are tried upon evidence that is carefully scrutinized, and not upon insinuation and hearsay; and it is an attack upon the prisoner's constitutional rights to influence the jurors by presenting to their minds charges against him of which no evidence has been offered, or by urging upon the jurors, or suggesting to them, that the defendant is guilty, and ought to be convicted."

In the case of *Griffin* v. *United States* 295 Fed. (3 C.C.A.) 437, the defendant was on trial for conspiracy to defraud the United States. During the course of the trial the defense called the attention of the court to the fact that members of the jury had been seen reading some newspapers, particularly the Philadelphia Evening Ledger, of that date, which contained a front page article with a caption headline as follows: "Prosecutor Asserts Five Defendants Wanted to Turn State's Evidence—Refused." Counsel thereupon moved for a withdrawal of the juror which was refused and an exception was noted. It appeared that similar statements were published in other

newspapers in Philadelphia on other days during the progress of the trial. In reversing and remanding for new trial because of this error, Circuit Court Judge Davis, in the *Griffin* case, stated (at pages 439, 440):

> "It is the right of a defendant accused of crime to have nothing reach the mind of the jury concerning the case except strictly legal evidence admitted according to law, and if facts prejudicial to him reach the jury otherwise, it is the duty of the trial judge to withdraw a juror and grant a new trial. * * *
>
> It is urged that there is no direct evidence that the jury read the newspaper reports. In the first place, it is admitted that the articles appeared on the front page of the newspapers, and there is no denial of the statement, made by counsel in his motion for the withdrawal of a juror, that 'members of the jury have been seen reading them.' Our opinion on this question was well expressed by Judge Acheson in the case of *Meyer, et al.* v. *Cadwalader,* 49 Fed. 32. * * *
>
> The defendants stoutly denied their guilt. It is not our duty or province to pass upon the merits of their defense, but it is our duty to see that it was presented to the jury free from bias or prejudice. Having reached the conclusion that it was not so presented, the judgment of the District Court is reversed, and a new trial granted." (Emphasis supplied.)

What occurred in the case at bar is comparable to the situation in the case of *United States* v. *Montgomery,* 42 F. (2d) 254, D.C. S.D.N.Y., decided by Judge Woolsey, where an article was published in a newspaper during the course of the trial, describing the defendant as a swindler, jail bird, disbarred lawyer, and ex-convict. At page 255, the Court said:

> "Will the orderly course of justice in this trial run the risk of being affected by any contraband information which may have reached the jury through the articles of which the defendants here complain?"

The jury in that case was polled and it appeared that four jurors had read the articles and of the four jurors upon being further interrogated three claimed that they could still deal with the case on the evidence, and the fourth, as the court said, "seemed to me to answer rather uncertainly and inconclusively." The court further said:

> "In addition to this impression as to this juryman, the fact, above mentioned, that one juror had asked another whether he had read the articles gave me an uneasy feeling that the objectionable statements would not be long unknown to the jurors who had not read them, and consequently that those statements might very well find a place alongside the evidence in the deliberations of the jury."

The court further said (p. 256):

> "In any event, however honest minded the jurors may be, such statements as were made in the objectionable articles would, I think, lurk in the background of their consciousness during their deliberations, and might, for example, cause them unconsciously to disregard the underlying requirement of a criminal case and to resolve any doubts they felt on the evidence against the defendants.
>
> Accurately to prophesy the influence and effect on the minds of jurors of what I have called the contraband information contained in these objectionable articles is, in my opinion, as impossible as it would be to foretell with any certainty the course of an infectious disease among them.
>
> Therefore I conclude that the defendants no longer have insured to them a fair trial solely on the evidence admitted therein to which, whether guilty or innocent, they are entitled."

Judge Woolsey then granted the motion for a mistrial. See also *Harrison* v. *U. S.*, 200 Fed. 662 (6 C.C.A.)

We submit that the circumstances surrounding this incident occurring during the trial of petitioner made manda-

tory the declaration of a mistrial pursuant to his motion made at the first opportunity and that its denial was an abuse of discretion. Permitting to stand convictions of serious felonies under the circumstances herein presented are not consistent with the standards of justice prevailing in our United States courts.

III.

The charge to the jury regarding the presumption of innocence constituted prejudicial error.

This charge is set forth at p. 4, *supra*. In effect the jury was told that the presumption of innocence applies only in favor of defendants innocent of the crime for which they are on trial. The great values to defendants of the presumption of innocence was stated by this Court in *Coffin* v. *U. S.*, 156 U. S. 432, in which the judgment of conviction was reversed because the Court had refused to charge relative to the presumption of innocence. This Court said: (pp. 3, 459)

> "**The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.** * * *
>
> p. 459 * * * **this presumption is an instrument of proof created by the law in favor of one accused whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.** This presumption on the one hand, supplemented by any other evidence he may adduce, and the evidence against him on the other, constitute the elements from which the legal conclusion of his guilt or innocence is to be drawn." * * *
>
> * * To say that the one is the equivalent of the other is therefore to say that legal evidence can be excluded from the jury, and that such exclusion may be cured by

instructing them correctly in regard to the method by which they are required to reach their conclusion upon the proof actually before them. In other words, that the exclusion of an important element of proof can be justified by correctly instructing as to the proof admitted. The evolution of the principle of the presumption of innocence and its resultant, the doctrine of reasonable doubt, makes more apparent the correctness of these views, and indicates the necessity of enforcing the one, in order that the other may continue to exist. Whilst Rome and the Mediaevalists taught that wherever doubt existed in a criminal case, acquittal must follow, the expounders of the common law, in their devotion to human liberty and individual rights, traced this doctrine of doubt to its true origin, the presumption of innocence, and rested it upon this enduring basis. **The inevitable tendency to obscure the results of a truth, when the truth itself is forgotten or ignored, admonishes that the protection of so vital and fundamental a principle as the presumption of innocence be not denied, when requested, to any one accused of crime.**" (Emphasis ours.)

No argument is needed to demonstrate that the refusal to instruct regarding the presumption of innocence must necessarily be less prejudicial than an instruction which tells the jury that the presumption of innocence is enjoyed only by an accused who is not guilty of the criminal charge upon which he is being tried.

In *Gomila* v. *U. S.*, 146 F. 2d 372, the Circuit Court of Appeals for the Fifth Circuit held that such an instruction was error because the fact of guilt does not enter into the question as to whether the defendant was entitled to the presumption of innocence. It said: (p. 373)

> "The statement that the presumption of innocence 'was not intended, nor has it ever been intended, as extending an aid to one, who in fact is guilty, so that he may escape just punishment,' is not a correct statement of the law. The presumption of innocence applies alike to the guilty and to the innocent, and the

burden rests upon the Government throughout the trial to establish, by proof beyond a reasonable doubt, the guilt of the accused. Until guilt is established by such proof, the defendant is shielded by the presumption of innocence. *The fact of guilt does not enter into the application of the rule, the intent and purpose of which is to protect all persons coming before the courts charged with crime* until the presumption of innocence is overthrown by evidence establishing guilt beyond a reasonable doubt; and, where the evidence is purely circumstantial, to the exclusion of every reasonable hypothesis of innocence." (Emphasis supplied.)

The conviction in that case was reversed, the Court holding that all three errors assigned, one of which was based upon the improper form of an instruction similar to the one here complained of, were cumulatively sufficient to require reversal. (See 146 F. 2d at 376) The Court did not hold that the giving of the instruction in question would not have required a reversal, if the other errors had not also been present. No such question was presented. We submit it to be obvious that the giving of such instruction in itself deprives the defendant of a fair trial and entitles him to a new trial. The fact that the Court in that case regarded the giving of such instruction as highly prejudicial is made obvious by the consideration that it noticed such error and based its reversal thereon, even though no exception had been taken to the instruction at the time it was given.

In the instant case also no exception was taken to the giving of this particular instruction at the conclusion of the charge, but it was assigned as error in the Court of Appeals. (Rec. 495) The opinion of the Court of Appeals herein, however, did not deal with this alleged error beyond stating that it did not "warrant a reversal." (Rec. 515)

In view of the serious injury which undoubtedly resulted from the giving of such instruction, the failure to save an exception thereto should not deprive petitioner of the right to a fair trial which was denied him by such charge. *Gomila* v. *U. S.*, 146 F. 2d 372. *Lamento* v. *United States*, 8 Cir., 4 F. 2d 901, 904. *Benson* v. *United States*, 5 Cir., 112 F. 2d 422, 423. *Brasfield* v. *United States*, 272 U. S. 448, 450, 47 S. Ct. 135, 71 L. Ed. 345. *United States* v. *Atkinson*, 297 U. S. 157, 160, 56 S. Ct. 391, 80 L. Ed. 555.

CONCLUSION.

We respectfully submit that the questions raised in the Petition make manifest that petitioner has been convicted in a manner and under circumstances which are violative both of his Constitutional guarantee of the "free exercise of his religion" and of his right to a fair trial in accordance with the standards of justice and civilized procedure applicable in the trial of criminal cases in the Federal courts; that the petition for writ of certiorari should be granted, and, upon the granting thereof, that the judgment affirming the conviction should be reversed and the cause remanded to the District Court for a new trial.

Respectfully submitted,

WALTER BACHRACH,
WALTER H. MOSES,
MORRIS SOLOMON,
H. G. SHEFFNER,
Attorneys for Petitioner.